not be subject to a subsequent suit by the general owner; for the wrongdoer is without a remedy against the bailee who sued him and has had satisfaction.[12]

This condition of law is no longer justifiable. The chief historical reasons underlying the old decisions have now become obsolete.[13] To-day title and the limited possessory interests are recognized as separable,[14] and capable of distinct valuation. So, if both the general owner and one having a special property have suffered damage by the wrongful act of a third party each should bring an action for his own actual loss. There can be no serious objection to a jury determining the value of the particular interest injured. This is done, constantly, in analogous cases, where limited interests in property are involved.[15] This was the view of an English court in an accurate and well-reasoned opinion.[16] It has been made the practice by statute in some American jurisdictions,[17] and recently the Massachusetts court indicated a leaning in this direction.[18] This comports with sound principles of damage law; and the only hardship on the parties would be merely such as are incident to all jury valuations.

REMOTENESS OF TRUSTS FOR ACCUMULATION DURING MINORITIES OF TENANTS IN TAIL.[1] — In determining whether provisions for accumulation by trustees during a term for years are too remote, it is submitted that three things must be considered: 1. the position of the term for years on which the trusts are raised; 2. the power to enter and accumulate; 3. the direction of the accumulated fund. If the term succeeds

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[12] Marriot *v.* Hampton, 7 T. R. 269; Hamlet *v.* Richardson, 9 Bing. 644. But *cf.* Duke de Cadaval *v.* Collins, 4 A. & E. 858.

[13] See 2 BEVEN, NEGLIGENCE, 736, note.

[14] Nicholls *v.* Bastard, 2 C. M. & R. 659; Manders *v.* Williams, 4 Exch. 339.

[15] Lienor and lienee: Fowler *v.* Gilman, 13 Met. (Mass.) 267. *Cf.* Mulliner *v.* Florence, 3 Q. B. D. 484. Pledgor and pledgee: White *v.* Allen, 133 Mass. 423; Johnson *v.* Stear, 15 C. B. N. S. 330. Mortgagor and mortgagee: Brierley *v.* Kendall, 17 Q. B. 937. Vendor and vendee: Chinery *v.* Viall, 5 H. & N. 288; Gillard *v.* Brittan, 8 M. & W. 575. Bailor and bailee: See The Winkfield, *supra*, 60.

[16] Claridge *v.* South Staffordshire Tramway Co., [1892] 1 Q. B. 422, 423, per Hawkins, J.: "It is true that if a man is in possession of a chattel and his possession is interfered with, he may maintain an action but only for the injury sustained by himself. The right to bring an action against a wrongdoer is one thing, the measure of damages recoverable in such action is another." For discussion of this case, see 6 HARV. L. REV. 156; 13 *id.* 411. It was doubted in Meux *v.* Great Eastern Ry. Co., [1895] A. C. 387, and overruled by the Winkfield case, *supra*.

[17] MICH. LAWS, 1865, 325, referred to in Weber *v.* Henry, 16 Mich. 399; Darling *v.* Tegler, 30 Mich. 54. These are cases of replevin, but this does not alter their importance as a matter of damages. *Cf.* GEORGIA CODE, 1911, tit. 9, c. 3, art. 2, § 4486; Lockhart *v.* Western & Atlantic R., 73 Ga. 472.

[18] See Bowen *v.* New York Central, etc. R. Co., 202 Mass. 263, 269, 88 N. E. 781: "The plaintiff has, as bailee, a special property . . . and so might sue in her own name for the injury to it, and at any rate, with the consent of the general owner, could recover full damages therefor." By thus qualifying the rule the Massachusetts court has removed the most objectionable feature from the law as laid down by Holmes, J., in Warner *v.* Brewster, 136 Mass. 57.

[1] This discussion excludes any consideration of the THELLUSSON ACT (39 & 40 GEO. 3, c. 98).

an estate tail, the trust cannot be too remote, as the term can be entirely destroyed by the tenant in tail.[2]

What if the term precedes an estate tail? If the trustees are to enter and accumulate for one year after the testator's death and pay the fund to a living person the trust is not too remote. But if the fund is to be paid to unborn grandchildren when they reach twenty-five, the trust is too remote,[3] because the direction of the fund is too remote. A similar result obtains if the fund is to be paid to the first tenant in tail that reaches twenty-one, for there might not be a tenant in tail who attained his majority for centuries. The power, however, to enter and accumulate is not too remote and there is a resulting trust of the fund to the heir of the testator.[4] Now if we substitute a power to enter and accumulate during the minority of any tenant in tail, the fund to be paid to the first tenant in tail that reaches twenty-one, the trust is again too remote ;[5] not, it is submitted, because the power to enter is too remote, for that is destructible by a tenant in tail, but because the direction of the fund is too remote. If, the power being the same, the fund were to be paid on the death of a person in being, the trust would not be too remote. And, this being true, it would seem that the trust is not too remote if the fund is to be used to purchase land to be settled on the same limitations as the property settled by the will, for barring the entail would destroy the purpose of the fund.

The English cases are opposed to this last proposition,[6] but there has been much dispute as to their correctness.[7] It is true that in all the above supposed cases the legal term is indestructible.[8] But in none of them was the remoteness determined by that, but rather by examining the power to enter and the direction of the fund. If both of these are destructible by a tenant in tail, it would seem to be immaterial that the dry term is not, for in case both the former are destroyed, the term would become attendant on the inheritance and a *cesser* take place.[9] By regarding merely the indestructibility of the legal term and not the destructibility of the trust, these cases sacrifice substance to form. A recent English decision is an example of this. The power was to enter and accumulate during the minority of any tenant in tail, the fund to be used in paying off incumbrances.[10] A long line of cases has held that such a direction is not too remote.[11] And, since no term was expressly given

[2] Goodwin *v.* Clark, 1 Levinz 35.

[3] Boughton *v.* James, 1 Coll. 26.

[4] Tregonwell *v.* Sydenham, 3 Dow 194. *Cf.* Hopkins *v.* Hopkins, Forrester 43. Another view is that the trust to accumulate sinks for the benefit of the devisees. See GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 671. Probably in the last analysis it is a question of the testator's intention. See Cook *v.* Stationers' Co., 3 Myl. & K. 262, 265; LEWIN, TRUSTS, 12 ed., 167, 177.

[5] Southampton *v.* Hertford, 2 Ves. & B. 54.

[6] Browne *v.* Stoughton, 14 Sim. 369; Turvin *v.* Newcome, 3 Kay & J. 16.

[7] See GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 456; LEWIS, SUPPLEMENT, 174. Arguments in support of these cases are to be found in 3 JUR. N. S., part 2, 181; 1 JARMAN, WILLS, 6 ed., 268 n.

[8] Eales *v.* Conn, 4 Sim. 65.

[9] *Cf.* SANDERS, USES, 5 ed., 203 n.

[10] Part of the receipts were to be used in maintaining the infant. That object is not too remote.

[11] Bacon *v.* Proctor, Turn. & R. 31; Bateman *v.* Hotchkin, 10 Beav. 426. See GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 676. *Contra*, Scarisbrick *v.* Skelmersdale, 17 Sim. 187.

to the trustees,[12] the trust was held to be valid.[13] *In re Earl of Stamford and Warrington*, [1912] 1 Ch. 343. It seems an unsubstantial refinement to say that the existence of a legal term would alter the result when, if the objects for which it solely exists are destroyed, the term itself becomes a mere shell and ceases.

THE DISABILITY OF HUSBAND AND WIFE AS WITNESSES FOR AND AGAINST EACH OTHER. — 1. At common law a husband or wife cannot testify either for or against the other where one is a party to either a civil suit or a criminal prosecution. The principal reason is that such testimony would be against public policy as tending to disturb the peace of families[1] and as contrary to a natural feeling of propriety.[2] Other considerations have undoubtedly been influential in producing this doctrine, such as the unity of interest making them subject to the rule disqualifying the parties to any suit,[3] and, in the case of the disability to testify in one another's favor, the general disqualification for interest.[4] The disqualification to testify for one another is clearly an incompetency,[5] for it would be quite ineffective if it could be waived. Some cases refer to the disability to testify against one another as being the privilege of the party spouse which cannot be waived without his consent.[6] More generally, however, it has been spoken of as absolute disability. There have been strong implications that it cannot be waived by either spouse,[7] and it has been held that it cannot be waived by the party spouse.[8] This rule would seem most in accord with the public policy which is perhaps the true reason of the doctrine. In a recent English case the court, in holding that a statute[9] which permitted the witness spouse to be called in certain criminal cases without the consent of the party spouse did not make the witness compellable, seems to take the view that this disability is at any rate a privilege of the witness spouse. *Leach* v. *Director of Public Prosecutions*, 132

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[12] The lower court held that the trustees, who had been given a term in another estate, had a legal estate by implication anterior to the estate tail and that the trusts were, therefore, too remote. *In re* Earl of Stamford and Warrington, [1911] 1 Ch. 255. Although the trustees were given power to hold manorial courts and accept surrenders of leases, the Court of Appeal said that surrenders could be accepted without a legal estate, and that the power to hold manorial courts would not be allowed. *Cf.* Henderson *v.* Henderson, 113 N. Y. 1, 20 N. E. 814. And the court held that there was merely a power of entry to receive the rents, and manage the estate. This goes very far in refusing to create an estate in the trustees by implication, and leads to the inference that the court was anxious to escape the doctrine of Browne *v.* Stoughton, *supra*. To the court's query what estate could be implied, it might be answered, a term for years preceding the other limitations.

[13] *Cf.* Waring *v.* Coventry, 1 Myl. & K. 249.

[1] See Barker *v.* Dixie, Cas. *t.* Hardw. 264; Kelley *v.* Proctor, 41 N. H. 139.
[2] See Knowles *v.* People, 15 Mich. 408, 413.
[3] See 1 GREENLEAF, EVIDENCE, 16 ed., § 334.
[4] See 1 WIGMORE, EVIDENCE, § 601 (2).
[5] See 1 WIGMORE, EVIDENCE, § 604 (1).
[6] See Pedley *v.* Wellesley, 3 C. & P. 558.
[7] Davis *v.* Dinwoody, 4 T. R. 678. See Sedgwick *v.* Watkins, 1 Ves. Jr. 49.
[8] Barker *v.* Dixie, *supra*. See Clark *v.* Krause, 13 D. C. 559, 572.
[9] THE CRIMINAL EVIDENCE ACT, 1898 (61 & 62 VICT., c. 36), § 4.